(13)

Supreme Court, U.S.
FILED
APR 7 1998
CLERK

No. 97-1374

In The

Supreme Court of the United States

October Term, 1997

WILLIAM J. CLINTON, ET AL.,

Appellants,

v.

CITY OF NEW YORK, ET AL.

ROBERT E. RUBIN,

Appellant,

v.

SNAKE RIVER POTATO GROWERS, INC., ET AL.

On Appeal From The United States District Court For The District Of Columbia

BRIEF AMICUS CURIAE OF JOHN S. BAKER JR. IN SUPPORT OF THE APPELLANTS, WILLIAM J. CLINTON, ET AL.

JOHN S. BAKER, JR.
Counsel of Record
Rm. 414
LSU Law Center
Baton Rouge, Louisiana 70803
(504) 388-8846

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

19 pp

QUESTION PRESENTED

The Line Item Veto Act, 2 U.S.C. § 691 et seq. (Supp. II 1996), gives the President conditional authority to cancel certain spending and revenue items within five days after a bill containing such items has been enacted into law.

The question presented is:

Whether the Act violates Article I of the Constitution or principles of separation of powers.

PARTIES TO THE PROCEEDINGS

The appellants here, who were the defendants in the district court, are William J. Clinton, the President of the United States; Donna E. Shalala, the Secretary of Health and Human Services; Franklin D. Raines, the Director of the Office of Management and Budget; and Robert E. Rubin, the Secretary of the Treasury. The appellees here, who were the plaintiffs below, are the City of New York; the New York City Health and Hospitals Corporation; the Greater New York Hospital Association; the Jamaica Hospital Medical Center; District Council 37, American Federation of State, County, and Municipal Employees; Local 1199, National Health and Human Service Employees Union; Snake River Potato Growers, Inc.; and Mike Cranney.

TABLE OF CONTENTS

Page

Table of Authorities iv

Opinion Below 1

Summary of Argument 1

Argument:

The Line Item Veto Act Is Consistent With Separation Of Powers 2

A. The District Court Mis-Characterized The Line Item Veto Act 3

B. The President's Veto Power Is The Principal Check On The Unconstitutional Spending By Congress 9

Conclusion 13

TABLE OF AUTHORITIES

Page

CASES:

Bowsher v. Synar, 478 U.S. 714 (1986) 3, 7

Cooley v. Board of Wardens, 12 How. (53 U.S.) 299 (1851) 12

Frothingham v. Mellon, 262 U.S. 447 (1923) 10

INS v. Chadha, 462 U.S. 919 (1983) 3, 8

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991) 3, 4

Mistretta v. United States, 488 U.S. 361 (1988) 3

South Dakota v. Dole, 483 U.S. 203 (1987) 10

United States v. Butler, 297 U.S. 1 (1936) 10, 11

United States v. Lopez, 514 U.S. 549 (1995) 7

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 3, 6

CONSTITUTION AND STATUTES:

U.S. Const.:
Art. I:
§ 7
Cls. 2 & 3 (Presentment Clauses) 8

§ 8
Cl. 1 ..... 2, 9, 10

STATUTES:

Impoundment Control Act of 1974 (ICA), Pub.L. No. 93-344, Tit. X, 88 Stat. 332 (codified as amended at 2 U.S.C. § 681 *et seq.*) 7

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

Gunther and Sullivan, *Constitutional Law* (Westbury, Foundation Press, 1997) 9

Hamilton, Madison, Jay, *The Federalist* (J. Cooke ed. 1961) 1, 4, 5, 6, 7, 8

Messages and Papers of the Presidents, II, 570 12

J. Story, *Commentaries on Constitution of United States*, 5th ed. vol. I 11

OPINION BELOW[1]

The opinion of the district court is available at 985 F. Supp. 168; 1998 U.S. Dist. LEXIS 1295.

SUMMARY OF ARGUMENT

The Line Item Veto Act does not violate the principle of separation of powers. The district court's conclusion to the contrary reflects a misunderstanding of how the principle of separation of powers was actually implemented in the Constitution. As a result of this mistaken premise, the district court mis-characterizes the Act as an improper ceding of legislative authority to the Executive Branch.

As explained in *The Federalist Papers*, the President has a qualified "negative" on legislation, i.e., veto, primarily for the purpose of self-defense against the encroachments of Congress. While the district court describes this Act as an intrusion into the Congress' law-making power, the Act actually responds to a relatively recent practice by which Congress bundles disparate pieces of legislation into a "bill." Through this practice,

---

[1] The parties have conserted to the filing of this brief. As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: This brief was authored for the amicus by John S. Baker Jr. No other persons authored this brief. No person or organization made a monetary contribution to the preparation and submission of this brief.

Congress has made it practically impossible for the President to exercise his constitutional responsibility to exercise an independent judgment about legislation presented to him. The Act meets the formal requirements specified in the Constitution for the President's handling of legislation, as explained in the Government's brief; moreover, it conforms to the plan of separation of powers found in the Constitution.

Article I, Section 8, Clause 1 of the Constitution provides that Congress' spending power is limited to the "general" – as opposed to "local" – welfare. At least some of Congress' spending appears to be in violation of this provision. Nevertheless, such limitations are generally not susceptible to judicial enforcement. Under the scheme created by the Constitution, it falls to the President to limit Congress to spending for the "general" welfare. The Line Item Veto Act, in accordance with the Constitution and the principle of separation of powers, enables the President to prevent at least some spending which affects only "local" welfare.

ARGUMENT

THE LINE ITEM VETO ACT IS CONSISTENT WITH THE SEPARATION OF POWERS

The argument of Amicus is limited to supplementing Part II B. (pages 36-41) of the Government's brief. More specifically, the argument elaborates on why the Line Item Veto Act does not violate the principle of separation of powers; indeed, it reinforces that principle.

A. THE DISTRICT COURT MIS-CHARACTERIZED THE LINE ITEM VETO ACT

The government writes that "the constitutional analysis in this case should turn on the *substance* of the powers vested in the President by the Line Item Veto Act," quoting this Court's statement that "separation-of-powers analysis does not turn on the labeling of an activity." Gov't Br. at 41, *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 267 (1991), quoting *Mistretta v. United States*, 488 U.S. 361, 393 (1988). The problem, as *Mistretta* went on to say, is that "[G]overnmental power cannot always be characterized with only one . . . labe[l]," quoting from a concurring opinion in *Bowsher v. Synar*, 478 U.S. 714, 749 (1986).

At the end of whatever process of analysis has been used to identify the substance of the activity, separation-of-powers cases generally do involve choosing among competing characterizations of the governmental activity at issue. Thus, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) characterizes the President's Executive Order to seize the steel mills as law-making; not execution of the laws, as the President contended. Those in the Court's majority may sometimes characterize an activity quite differently. Thus in *INS v. Chadha*, 462 U.S. 919 (1983), the opinion for the Court characterizes as legislative the House of Representatives' resolution that Chadha's deportation order "should not be suspended," making the action subject to the presentment and bicameralism requirements. Although agreeing that the House action violated separation of powers, the concurring

opinion of Justice Powell characterizes the same action as "judicial." On at least one occasion, the Court has recognized that a congressional act could be properly characterized in either of two ways, both of which violated separation of powers. In striking down a congressionally created Board of Review, consisting of members of Congress, *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991) stated: "If the power [of the Board] is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements."

The lower court characterizes the Line Item Veto Act as law-making by the President. (It "ced[es] inherently legislative authority to the President" 985 F. Supp. 168 (1998), Lexis 1295, 44. This characterization concludes a discussion of separation of powers which begins with the statement that the "Act is unconstitutional because it impermissibly disrupts the balance of powers among the three branches of the government," *id.* at 38 and proceeds to find an impermissible delegation of legislative power. To the extent that the anti-delegation argument of the lower court requires refutation, the Government does so in Part II C. (pp. 41-49). The Government brief might have done more, however, to address the lower court's claim about the balance of power.

1. The lower court's characterization of the Line Item Veto Act seems to proceed from its understanding of separation-of-powers principles. While the lower court opinion cites *The Federalist Papers*, your Amicus submits that the opinion misconceives the relationship between

the President and Congress as created by the Constitution and explained in *The Federalist*. Without rehearsing the basics of the separation-of-powers doctrine presented in *The Federalist* and addressed at length in this Court's separation-of-powers cases since *Chadha*, a few points deserve attention.

A constitutional system based on separation of powers does not naturally tend toward equilibrium. The threat to balance in the government of the United States, according to Madison in *Federalist 51*, comes primarily from the legislative branch.

> In republican government the legislative authority, necessarily, predominates. . . . As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified.

Federalist No. 51, p. 350 (J. Cooke ed., 1961).

The balance created in the Constitution was achieved largely by fortifying the President with the veto (and the Judiciary with judicial review). The primary purpose of the President's veto power, according to the Framers, was not to produce better legislation – that was only secondary. The primary purpose was to provide the President with a weapon of self-defense.

> The primary inducement to conferring the power [to veto legislation] upon the executive, *is to enable him to defend himself*; the secondary one is to increase the chances in favor of the community, against passing of bad laws, through haste, inadvertence, or design.

Federalist No. 73, p. 495.

If one thinks that the veto is only, or principally, about law-making, then – like the lower court – the tendency would be to view the veto very narrowly. Indeed, *The Federalist* has to defend the Constitution against the Antifederalist charge that the Constitution violates separation of powers due to various checks of one branch on the other, see *Federalist* No. 47, and that the President's "negative" improperly interferes with law-making. See *Federalist* No. 73. If, on the other hand, one thinks that the veto is principally about self-defense for the Executive, then in characterizing the Line Item Veto Act, one would give great weight to Madison's warning that the legislative power "can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the coordinate departments." *Federalist* No. 48, p. 334.

2. So what encroachment by the Congress against the President has occurred for which the Line Item Veto Act might provide self-defense? Is not the danger, rather, that potentially the Executive Branch will over-reach Congress – even if that might not have seemed likely two hundred years ago? One could cite *Youngstown* and argue that with the advent of the administrative state and the nationalization brought about by two world wars that the Executive has become a greater danger than anticipated by the Framers. *Youngstown*, however, is the exception that proves the rule. *Youngstown* involves an initiative by the President justified by joining his (domestic) executive powers and his Commander-in-Chief powers and a claim about implied powers. The one presidential initiative since *Youngstown* on the domestic front based on a claim of implied powers and not sanctioned by Congress

involves President Nixon's efforts to impound funds voted by the Congress. See Government Br. at 5. Is it surprising that that effort was short-lived as Congress enacted the Impoundment Control Act of 1974 (ICA), Pub. L. No. 93-344, Tit. X, 88 Stat. 332 (codified as amended at 2 U.S.C. §§ 681 *et seq.*)?

The ICA was amended in 1996 by the Line Item Veto Act. See Pub. L. No. 104-130, 110 Stat. 1200 (J.S. App. 36a-60a) (codified at 2 U.S.C. §§ 691 *et seq.* (Supp. II 1996)). Could it be that legislation originally enacted to block the Executive's refusal to carry out the will of Congress is now, as the lower court put it, "ceding inherently legislative authority to the President?" 985 F. Supp. 168 (1998), Lexis 1295, 44. The change in parties controlling the Congress and the Presidency may account for the passage of legislation. A change in parties and policy, however, does not mean that Congress as an institution will act fundamentally in a manner different from what was described in *The Federalist*.

Rather than "ceding" legislative power, the Congress continues to demonstrate its willingness to expand its legislative powers, albeit in different areas such as crime control. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995). Expanding power comes much more easily than shedding it – much like weight gain. The anti-crime policies of the majority of this Congress, therefore, are more easily implemented than its attempts at budget control. On spending matters, Congress has tried the Balanced Budget and Emergency Deficit Control Act of 1985, a key provision of which was invalidated in *Bowsher v. Synar*, 478 U.S. 714 (1986). As a result of *Bowsher*, it is clear that

Congress itself cannot exercise executive control to discipline spending.

In judging whether Congress has encroached on the Executive, it is well to remember that "[i]t is not unfrequently [sic] a question of real nicety in legislative bodies, whether the operation of a particular measure, will, or will not extend the legislative sphere." *Federalist* No. 48 at 334. The encroachment by Congress to which the Line Item Veto Act responds is noted, but not developed, in the Government's brief. "In recent years, Presidents have regularly been compelled to make all-or-nothing decisions to accept or reject large combinations of multifarious spending items." Gov't Br. at 35. This results from "the recent congressional practice of (1) routinely combining numerous and diverse spending items in a single bill, and (2) sharply restricting the President's authority to decline to spend appropriated funds." *Id.* Congress has in practice, therefore, succeeded in evading, through indirection, what Madison attempted to prevent with his addition to the presentment requirement.

As noted in the Government's brief at 33, n. 17, Madison feared that Congress could avoid the requirement of presentment of "Bill[s]," Article I, Section 7, Clause 2, "by the simple expedient of calling a proposed law a 'resolution' or 'vote' rather than a 'bill.' " *INS v. Chadha*, 462 U.S. 919, 947 (1983). Thus Clause 3 was added which requires presentment of "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment)." So Congress honors the form, but not the substance, of the provision by "presenting"

such a bundle that the President cannot possibly give such "bills" his considered approval.

In effect, although not formally, the Line Item Veto Act allows the President partially to un-bundle what the Framers would not have considered a proper "bill." The Government brief does not make that argument, instead emphasizing that the "Act Is Consistent With The Constitutional Requirement That The President 'Sign' Or 'Return' A Presented Bill *In Toto*." Br. at 33, II A. Whether or not this Court agrees with the Government's characterization of the Act as "remaining faithful to the procedural requirements of Article I," *id.*, should turn on whether the formalities of the Act conform in substance to the Constitution's separation-of-powers principles. The lower court's rejection of the Government's position appears to have been based on its (mis)conception of separation-of-powers principles. Amicus urges that the Act is consistent not only as a technical matter of form with the Constitution, which is what the Government emphasizes, but that the formal consistency also comports with the Constitution's principles of separation of powers.

B. THE PRESIDENT'S VETO POWER IS THE PRINCIPAL CHECK ON UNCONSTITUTIONAL SPENDING BY CONGRESS

Although "[t]he national spending power is probably the most important of all Art. I, Sec. 8, powers in its impact on the actual functioning of the federal system," Gunther and Sullivan, *Constitutional Law* (Westbury, Foundation Press, 1997), congressionally approved spending which might violate the Constitution almost

always escapes judicial review. As a general rule, taxpayer status does not confer the standing necessary to challenge spending legislation. *Frothingham v. Mellon*, 262 U.S. 447 (1923). Moreover, while taxpayers generally do not have access to the courts to challenge the constitutionality of government spending, those claiming benefits under a statute do have access to court to challenge the denial of those benefits on statutory and/or constitutional grounds. The result is an unintended bias in favor of more spending.

The spending power of Congress is not without constitutional limits, as Justice O'Connor observed in *South Dakota v. Dole*, 483 U.S. 203, 212, dissenting opinion (1987). Those limits are articulated in one of the few cases in which a taxpayer had standing due to the designation of the taxes for a particular spending program: *United States v. Butler*, 297 U.S. 1 (1936). "While Butler's authority is questionable insofar as it assumes Congress has no regulatory power over farm production, *its discussion of the spending power and its description of both the power's breadth and its limitations remain sound.*" *Id.* at 216-17 (emphasis added), O'Connor, J., dissenting.

Butler endorsed a broad view of the ability of Congress to spend pursuant to Article I, Section 8, Clause 1 which provides Congress the "Power To lay and collect Taxes, . . . to pay Debts and provide for the common Defence and *general* Welfare . . . " (emphasis added). Nevertheless, even under that view the clause contains limits which cast doubt on the constitutional validity of certain categories of "pork-barrel" spending. *Butler* observed that "[s]ince the foundation of the nation sharp

differences of opinion have persisted as to the true interpretation" of the spending provision. After describing Madison's narrower view and the broader Hamilton-Story view, the Court "conclude[d] that the reading advocated by Mr. Justice Story is the correct one." 297 U.S. at 66.

The Court then quoted from Justice Story's explanation of the limits on Congress' power to spend for the general welfare, as follows:

> "The Constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers."

Again he says:

> "A power to lay taxes for the common defense and general welfare of the United States is not in common sense a general power. It is limited to those objects. It cannot constitutionally transcend them."

> *Id.*, quoting from Story, *Commentaries on Constitution of United States*, 5th ed. vol. I., Secs. 909 and 922.

Butler also noted that Story "makes it clear that the powers of taxation and appropriation extend only to matters of national, *as distinguished from local, welfare.*" *Id.* at 67. (emphasis added).

Amicus is not suggesting that this Court should start striking down spending legislation; quite the contrary. Even if taxpayers could establish the necessary standing, it is very doubtful that this Court could develop judicially

enforceable standards applicable to congressional spending generally (as opposed to the issues of conditional-spending). The "local-general" distinction suggested by Justice Story would seem to be as unworkable as the "local-national" distinction proved to be as applied to the Commerce Clause, beginning with *Cooley v. Board of Wardens*, 12 How. (53 U.S.) 299 (1851).

If constitutional restraints are ever again to be imposed on Congress' spending appetite, as a practical and a separation-of-powers matter, only the Executive can do so. That is not to suggest that the Executive should intrude into the prerogatives of this Court. Rather, as President Madison stated in vetoing an internal improvements spending bill for constitutional reasons, "questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision." *Messages and Papers of the Presidents, II*, 570.

The President has a national constituency; members of Congress have a local or state constituency. On spending matters, members of Congress cannot be expected to act always for the "general" welfare. As shaped by the Constitution, including the veto power, the Presidency has the competence and the motives to act for the "general" welfare. The Line Item Veto Act allows for the possibility that the President will veto spending for "local" welfare and thus bring federal spending more in line with the Constitution.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

JOHN S. BAKER, JR.*
Counsel of Record
Rm. 414
LSU Law Center
Baton Rouge, Louisiana 70803
(504) 388-8846

April 2, 1998

* Counsel gratefully acknowledges the assistance of Mr. Travis N. Bolin.